expressed "doubt[] that the generic identification of 'subjectivity,' which is inherent in any interview process, would satisfy the requirement that [Anderson] identify a 'specific employment practice,'" but held that, in any event, "Anderson's claim clearly fails due to the lack of proof of causation" because Dr. Bradley did "not control for *any* of the myriad of possible legitimate causes of the statistical disparity" that he identified. Pet. App. 86, 87 (emphasis added).

The Fourth Circuit affirmed. The court initially assumed, *arguendo*, that, challenging particular steps of the CBPS was sufficient to identify the employment practices being challenged (insofar as each step comprised multiple "core" and "functional" competencies that are used as selection criteria, such as "business results," "leadership," and "communications"). Pet. App. 29. But the court held that Anderson had not established that any particular employment practice had *caused* a disparate impact on the basis of race because Dr. Bradley had merely "compared the percentage of black employees who actually succeeded at each level [of the CBPS] with the percentage which he expected to succeed"—without "account[ing] for *any* other variables" and without testing which, if any, selection criteria accounted for the disparity. Pet. App. 30 (emphasis added). Indeed, the court stressed that multiple variables affect promotion decisions under the CBPS, including the core and functional competencies considered at each stage. *Id.* The court concluded that Dr. Bradley's evidence could not establish causation because identifying a disparity, without more, "does not show that the *reason* black applicants" were excluded from jobs or promotions was that a *particular* employment practice caused a disparate impact on the basis of race. *Id.* (emphasis added).

Judge Gregory dissented in part. Judge Gregory agreed with the majority that the district court had properly granted summary judgment on Anderson's disparate-treatment

claims, that Anderson's challenges to various evidentiary rulings by the district court were meritless, and that no class had to be certified on the record before the court. Pet. App. 50. Nevertheless, Judge Gregory argued that Dr. Bradley's study regarding the CBPS supported an inference of causation and allowed Anderson to make out a triable disparate-impact claim. Pet. App. 58-63.

Anderson sought rehearing and rehearing *en banc* on numerous questions, including whether *Watson* "permits statistical analysis of challenged employment policies that include both subjective and objective criteria"; whether the panel's opinion contravened *Bazemore v. Friday*, 478 U.S. 385 (1986), by finding that Dr. Bradley's statistics were insufficient to establish causation; and whether the panel improperly applied a disparate-treatment standard to Anderson's disparate-impact claim. *See* Anderson's Pet. for Reh'g and Reh'g *En Banc* at 1-15. (Only the latter two questions are within the scope of the petition for a writ of certiorari.) The court denied rehearing (by a 2-1 vote) and rehearing *en banc* (by a 7-5 vote). Pet. App. 92. Judge Gregory dissented, again writing to express the view that, on the facts of record, Anderson had made out a triable disparate-impact claim. Pet. App. 93-94.

REASONS FOR DENYING THE WRIT

Under this Court's rules, the Court will expend its limited resources to review a case only where there are "compelling reasons" for doing so, such as a conflict between the holding of the court below and that of this Court or another appellate court "on the same important matter" of federal law. *See* Supreme Court Rule 10. A case is *not* suitable for this Court's review where the issue on which review is sought is narrowly fact-bound, *see, e.g., Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955); or where a petition seeks error correction with respect to the alleged misapplication of a settled rule of law, *see* Supreme Court Rule 10; *Gonzales v.*

Crosby, 125 S. Ct. 2641, 2655 n.7 (2005) (Stevens, J., dissenting) ("error-correction is a disfavored basis for granting review"); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., dissenting from denial of cert.) ("[W]e cannot act as a court of simple error correction."). Moreover, a "*genuine* conflict" of authority that may merit this Court's review arises only "when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.3, at 225 (8th ed. 2002) (emphasis added). In contrast, a case is not an appropriate candidate for this Court's review where a petition demonstrates, at most, "an inconsistency in dicta or in the general principles utilized" by two courts, *see id.*; or that a lower court's "opinion could have been written more precisely than it was," *see Michigan v. Lucas*, 500 U.S. 145, 155 (1991) (Stevens, J., dissenting).

Under these standards, this petition for a writ of certiorari should be denied. The Fourth Circuit's decision correctly applies settled, uniform legal precedents to the undisputed facts of record and creates no new principles of law. Indeed, the Fourth Circuit's holding that Anderson failed to establish a triable question of material fact about whether a specific employment practice used by Respondents caused a disparate impact on the basis of race was compelled by the Civil Rights Act of 1991 and by this Court's opinions in *Watson* and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Anderson's argument to the contrary, in an attempt to demonstrate a conflict of authority, fundamentally misinterprets the opinion of the court below and the decisions of this Court and of other circuits, and ignores the record evidence in this case. At bottom, Anderson simply disagrees with the factbound result reached by the Fourth Circuit, in large part because she chooses to disregard the undisputed record. But the Fourth Circuit's decision was correct, and in any event, this Court does not "sit for the

benefit of . . . particular litigants," *Rice*, 349 U.S. at 74, who claim to be aggrieved by "the misapplication of a properly stated rule of law," Supreme Court Rule 10.

I. THE DECISION BELOW CORRECTLY APPLIED SETTLED LAW TO THE UNDISPUTED FACTS OF RECORD AND DOES NOT MERIT THIS COURT'S REVIEW.

The decision below announced no new principle of law and rested upon the factbound application of settled law to the undisputed record in this case. Accordingly, the decision below does not warrant consuming this Court's limited resources to review.

The Fourth Circuit properly held that Respondents are entitled to summary judgment on Anderson's disparate-impact claim involving the CBPS because Anderson failed to establish a triable question of material fact about whether a specific selection criterion used by Respondents caused a disparate impact on the basis of race. To establish a disparate-impact claim, a plaintiff must satisfy the rigorous standards set forth in the Civil Rights Act of 1991:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if – (i) a complaining party demonstrates that a respondent uses a *particular* employment practice that *causes* a disparate impact on the basis of race.
>
> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that *each particular challenged employment practice causes* a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

42 U.S.C. § 2000e-2(k)(1)(A), (B) (emphasis added).

The statute embraces pre-enactment case law stating that a disparate-impact claim legally fails where a plaintiff has not identified a *specific* selection criterion and shown that the particular criterion *causes* a disparate impact. Specifically, in *Watson*, Justice O'Connor wrote that:

> [T]he plaintiff's burden in establishing a *prima facie* case [of disparate-impact discrimination] goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the *specific* employment practice that is challenged . . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

487 U.S. at 994 (plurality opinion) (emphasis added). Moreover, the "plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has *caused* the exclusion of applicants for jobs or promotions *because of their membership in a protected group*." *Id.* (emphasis added)

One year later, in *Wards Cove*, 490 U.S. at 656-57, a majority of this Court quoted and adopted Justice O'Connor's approach in *Watson*, stressing that "[o]ur disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities." (emphasis in original.) Thus, "a Title VII plaintiff does not make out a case of disparate impact simply by showing . . . [a] racial imbalance in the [employer's] work force." *Id.* at 657 (emphasis omitted). Rather, "a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Id.* (explaining that plaintiffs must

"demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking . . . specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites").

The courts of appeals have uniformly applied these standards and held that a disparate-impact claim fails where the plaintiff does not show that a racially disparate impact was *caused* by a particular employment practice. *See, e.g.*, *Donnelly v. R.I. Bd. of Governors for Higher Educ.*, 110 F.3d 2, 4 (1st Cir. 1997) (plaintiff "failed to establish . . . the existence of a causal relationship between the [challenged practice] and any purported disparate impact"); *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 111 (2d Cir. 2001) (plaintiff "fail[ed] to suggest what specific employment practice accounts for" the disparity identified); *Newark Branch, N.A.A.C.P. v. City of Bayonne*, 134 F.3d 113, 121, 124 (3d Cir. 1998) (plaintiffs "simply have not shown that [the challenged practice], *independent of other factors that may affect the racial balance of the workforce*, is *causally* related to discrimination in the number of blacks hired or promoted") (emphasis added); *McNairn v. Sullivan*, 929 F.2d 974, 979 (4th Cir. 1991) (plaintiff "does not attempt to show that the [challenged] subjective element of HHS promotion criteria significantly affected qualified blacks' and Hispanics' chances to be promoted"); *Munoz v. Orr*, 200 F.3d 291, 299-300, 303-04 (5th Cir. 2000) (plaintiffs failed to show that alleged disparate impact was caused by challenged practice); *Stout v. Potter*, 276 F.3d 1118, 1121, 1125 (9th Cir. 2002) (plaintiffs challenging stages of a selection process failed to show which "discrete elemen[t]" of the process—such as "the applicant's supervisor evaluations" and scores on eleven "competencies"—"caus[ed] . . . the claimed gender disparity"); *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242-43, 1245-46 (10th Cir. 1991) (plaintiffs failed to show that the challenged employment practice, rather than

employees' preferences and qualifications, caused a gender disparity); *Cooper v. Southern Co.*, 390 F.3d 695, 724 (11th Cir. 2004) (plaintiffs "failed to demonstrate a causal nexus between any statistical disparities in the defendants' workforce and the [challenged] practice of using partially subjective hiring criteria"), *cert. denied*, 126 S. Ct. 478 (2005).

Applying these settled principles to the particular factual record before it, the Fourth Circuit correctly concluded that Anderson had failed to establish a triable question of material fact about whether a specific selection criterion used by Respondents caused a disparate impact on the basis of race. As an initial matter, while Anderson challenged the second and third stages of the CBPS and the alleged subjectivity inherent in those stages, *see* Pet. 17-18, she did not identify any *specific* selection criterion, subjective or otherwise, within those CBPS stages that allegedly had a disparate impact on African-Americans, as she was required to do. *See Wards Cove*, 490 U.S. at 656-57; *Watson*, 487 U.S. at 994. While the Fourth Circuit was willing to assume, *arguendo*, that challenging particular steps of the CBPS was sufficient to identify the employment practices being challenged, Pet. App. 29, the court nevertheless quite correctly held that Anderson had not provided evidence that any one (or more) of these selection practices had *caused* a disparate impact on the basis of race, because Dr. Bradley had merely "compared the percentage of black employees who actually succeeded at each level [of the CBPS] with the percentage which he expected to succeed"—without "account[ing] for *any* other variables" besides race and without testing which, if any, selection criteria accounted for the disparity. Pet. App. 30 (emphasis added). Merely identifying a disparity, without more, the court explained, "does not show that the *reason* black applicants" were excluded from jobs or promotions was that a *particular* employment practice caused a disparate impact on the basis of race. *Id.* (emphasis added).

The Fourth Circuit's decision is wholly unremarkable. It does not establish any new principle of law; it follows settled law. Nor does the decision even err in applying these settled principles of law; Anderson has never even claimed to have shown which core or fundamental competencies or other selection device caused a disparate impact. Indeed, Dr. Bradley admitted that he did not even know any of the factors that affected promotion decisions at any of the challenged stages of the CBPS. J.A. 8082-92.

There is no error here, much less an error resulting from an important question of law as to which other courts have disagreed. As the Fourth Circuit stressed, it is undisputed that the CBPS constrains managers' subjective discretion at each stage through six core competencies necessary for all jobs as well as functional competencies unique to each job opening, with a weight assigned to each competency. Pet. App. 30. In addition, Respondents maintain records of criteria-specific scores assigned to applicants for jobs posted through the CBPS. J.A. 11065-11170. Accordingly, Dr. Bradley could have determined what disparate impact, if any, the use of *each* core and functional competency had on African-American candidates. Because Dr. Bradley failed to show which aspect of the selection process—the use of a particular core or functional competency, the manager's involvement, the panel's involvement, the questions asked at the interview—allegedly caused the claimed disparate impact, and chose instead to test the *cumulative* effect of all selection criteria at each stage, the Fourth Circuit correctly, and consistently with the decisions of other courts, determined that his testimony was legally insufficient to establish the inference of causation required by *Watson*, *Wards Cove*, and the Civil Rights Act of 1991.

In short, the decision below is consistent with this Court's decisions and creates no new legal principles or split among the circuits. At bottom, Anderson simply disagrees with the Fourth Circuit's factbound application of longstanding legal

principles to the particular circumstances of this case. Her request for factbound error correction is itself wrong and in all events does not warrant this Court's review.

II. ANDERSON MISCHARACTERIZES THE DECISIONS OF THE COURT BELOW, OF THIS COURT, AND OF OTHER CIRCUITS, AND FAILS TO DEMONSTRATE A SPLIT OF AUTHORITY.

Ignoring the unbroken line of cases (and factual record) that support the Fourth Circuit's decision here, Anderson misinterprets the opinion below and the decisions of this Court and other circuits in an unavailing attempt to demonstrate a conflict of authority. The Court should ignore Anderson's misguided effort.

1. Echoing the misplaced assertions of the dissenting opinion below, Anderson argues that the Fourth Circuit majority, contrary to the decisions of other courts, erroneously applied the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), disparate-treatment standard to her disparate-impact claim and incorrectly required her to prove intentional discrimination as an element of a disparate impact claim. Pet. 8-17. But the decision below did no such thing.

Consistent with the authority cited by Anderson, *see* Pet. 12-14, 25-26, the Fourth Circuit correctly explained the burden-shifting scheme applicable to disparate-impact claims, and at no point did it hold that proof of discriminatory intent is necessary for such a claim. *See* Pet. App. 27-29 (citing, *inter alia*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Connecticut v. Teal*, 457 U.S. 440 (1982)). Rather, as explained above, the Fourth Circuit *held* that the district court had correctly granted summary judgment to Respondents on Anderson's disparate-impact claim with respect to the CBPS because Anderson failed to offer legally sufficient proof of causation, *not* because she

failed to prove intentional discrimination. Pet. App. 29-31; *see also supra* at 6, 12-13.

To be sure, the court below went on to address the argument—made by Anderson in her brief on appeal, *see* Appellant's Br. in the Fourth Circuit at 60, and challenged by Respondents, *see* Appellees' Br. in the Fourth Circuit at 54—that Dr. Bradley's study regarding the alleged disparate impact of the CBPS is, in the alternative, legally sufficient to establish the inference of intentional discrimination required for a disparate-treatment claim. Specifically, the court "assume[d] for argument, without deciding," that Dr. Bradley's evidence of adverse impact established a prima facie case of disparate treatment; the court identified the legitimate non-discriminatory reasons for the challenged employment decisions; and the court concluded that Anderson's evidence of pretext was legally insufficient to support a disparate-treatment claim under the *McDonnell Douglas* framework. Pet. App. 32-33. That inquiry, which Anderson herself urged the court to undertake, was quite proper and in no way applies disparate-treatment standards to a disparate-impact claim or requires Anderson to prove intentional discrimination to establish a disparate impact claim.

Indeed, that inquiry is neither relevant nor necessary to the court's *holding* that Anderson's disparate-impact claim failed because she did not make the requisite showing of causation. Rather, the court merely recognized, consistent with Anderson's own argument and with authority from other circuits, that a statistical showing of adverse impact may also be relevant to a disparate-treatment claim, and it asked whether that showing, combined with other evidence in the record, was sufficient to establish a triable claim of disparate treatment. *See, e.g.*, *Munoz*, 200 F.3d at 302; *Anderson v. Zubieta*, 180 F.3d 329, 339-40 (D.C. Cir. 1999); *Smith v. Xerox Corp.*, 196 F.3d 358, 370-71 (2d Cir. 1999); *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1476

(9th Cir. 1995); *Howard v. BP Oil Co.*, 32 F.3d 520, 527 (11th Cir. 1994); *Frazier v. Consol. Rail Corp.*, 851 F.2d 1447, 1449-53 (D.C. Cir. 1988). As the Fourth Circuit correctly held, Anderson's evidence of pretext is plainly insufficient to support such a disparate-treatment claim, and even Anderson, in her petition for certiorari, does not contend otherwise.

Anderson's allegation that the court below required her to prove intentional discrimination to establish her disparate-impact claim rests on an erroneous reading of the court's opinion. Indeed, in the eight months since the Fourth Circuit issued its opinion in this case, not a single decision, brief, law review article, treatise, periodical, or other source available on Westlaw or Lexis has interpreted the opinion below in the way that Anderson suggests. There is no basis for Anderson's assertion that the opinion below contravenes the decisions of this or other courts or presents a question of exceptional importance warranting this Court's review.

2. In a further unavailing attempt to demonstrate a circuit split that does not exist, Anderson also offers a litany of repetitive arguments regarding the Fourth Circuit's discussion of the flaws in Dr. Bradley's study. Pet. 17-29. Anderson again misconstrues the opinions of the Fourth Circuit, of this Court, and of other courts of appeals; fails to show a conflict of authority or any other basis for this Court's review; and is wrong on the merits of her factbound contentions.

a. As an initial matter, Anderson fundamentally misunderstands the decision below in arguing that the court imposed a "heightened standard of causation" and required disparate-impact plaintiffs to offer statistical evidence of intentional discrimination. Pet. 17. In explaining that Dr. Bradley's "evidence does not show that the reason black applicants failed to proceed at the interview selection stage and position selection stage was their race," Pet. App. 30, the

Fourth Circuit was merely adverting to the requirement, as expressed by this Court, that a disparate-impact plaintiff "offer statistical evidence of a kind and degree sufficient to show that the practice in question has *caused the exclusion of applicants for jobs or promotions because of their membership in a protected group*." *Watson*, 487 U.S. at 994 (emphasis added). In context, it is plain that both the district court and the Fourth Circuit faulted Dr. Bradley's study not for failing to show *intentional* discrimination (which disparate-impact plaintiffs are not required to do), but for failing to identify which specific employment practice that entered into and circumscribed "the judgment of the members of the panel"—factors such as "the core competencies listed in the CBPS manual," "the specific functional competencies," "education," "experience," "presentation in the interview, answers to interview questions, demeanor, and ability"—had caused the alleged disparity. Pet. App. 30, 86-87; *see also supra* at 5-6, 12-13. Whether or not the passage in question "could have been written more precisely than it was," Anderson's parsing of the Fourth Circuit's language provides no basis for granting certiorari. *See Lucas*, 500 U.S. at 155 (Stevens, J., dissenting) (explaining that this Court does "not [sit] as an editorial board of review").

b. Anderson likewise errs, and fails to demonstrate a conflict of judicial authority, in arguing that the decision below contravenes *Bazemore*, 478 U.S. 385, and its progeny. Pet. 19-25. This Court held in *Bazemore* only that the "omission of variables from a regression analysis" will ordinarily "affect the analysis' probativeness, not its admissibility." 478 U.S. at 400. Consistent with *Bazemore*—as well as *Watson*, *Wards Cove*, and the Civil Rights Act of 1991—the court below held that, because Dr. Bradley had failed to account for *any* variables besides race, and had failed to analyze whether specific selection criteria caused a disparate impact, his testimony, the *admissibility* of which the court acknowledged, was not *sufficiently probative*

to establish an inference of causation. *Bazemore* does not even speak to that question.

Anderson further errs in suggesting that the Fourth Circuit, in conflict with *Bazemore* and lower-court cases following it, erroneously imposed on her "the burden to demonstrate that including additional omitted variables" in Dr. Bradley's study would have "alter[ed] the statistical results." Pet. 21-22. Even where, unlike here, the admissibility of a regression analysis is at issue, there are "instances in which the relevance of a factor to the selection process is so obvious that the defendants, by merely pointing out its omission, can defeat the inference of discrimination created by the plaintiffs' statistics." *Palmer v. Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987) (citing *Bazemore*, 478 U.S. at 400 n.10); *see also EEOC v. Gen. Tel. Co. of N.W., Inc.*, 885 F.2d 575, 582 (9th Cir. 1989). More importantly, Anderson erroneously conflates the burdens of the parties in an admissibility determination with the *plaintiff*'s *substantive burden* to prove a *prima facie* case of disparate-impact discrimination. *See, e.g.*, *Wards Cove*, 490 U.S. at 656-57; *Watson*, 487 U.S. at 994; *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998) (explaining that Title VII "places an initial burden on the plaintiff to show that the specific factor challenged under the disparate impact model results in the discriminatory impact"); *Newark Branch, N.A.A.C.P.*, 134 F.3d at 121-22 (explaining that "[t]he causal requirement recognizes that under representation of blacks might result from any number of factors, and it places an initial burden on the plaintiff to show that the specific factor challenged under the disparate impact model results in the discriminatory impact") (internal citations omitted); *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 189-90 (5th Cir. 1983) (same). The Fourth Circuit's decision comports with the settled rule that "a Title VII plaintiff does not make out a case of disparate impact simply by showing . . . [a] racial imbalance in the [employer's] work force." *Wards Cove*, 490 U.S. at 657 (emphasis omitted). Rather, the "*plaintiff*

must demonstrate that it is the application of a *specific* or *particular* employment practice that has created the disparate impact under attack." *Id.* (emphasis added).

Anderson also alleges that the Fourth Circuit, contrary to cases following *Bazemore*, improperly required a statistical analysis to "control for the very factors being challenged." Pet. 19-20. But Anderson again misunderstands both the Fourth Circuit's opinion and the cases from other circuits on which she relies, and she therefore fails to demonstrate a circuit split. The Fourth Circuit did *not* require Anderson to control for the employment practices that she challenges. Rather, because Dr. Bradley did not control for *any* variables besides race and job title, the court below simply held that he failed to show *which*, if any, selection practices caused the alleged disparate impact. *See supra* at 6, 12-13. In contrast, in *Zubieta*, 180 F.3d at 342, and *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1414 (D.C. Cir. 1989), on which Anderson relies, the plaintiffs isolated a particular challenged practice that was responsible for the identified disparity. In that context, the D.C. Circuit explained that the plaintiffs were not required to *also* control for the specific practice being challenged because doing so would eliminate the very disparity at issue. *See Zubieta*, 180 F.3d at 342; *Berger*, 843 F.2d at 1417-18; *see also Morgan v. United Parcel Serv.*, 380 F.3d 459, 470 (8th Cir. 2004) (explaining that disparate-treatment plaintiffs improperly excluded potential legitimate explanatory variable from regression analysis where that variable did not reflect the very discrimination of which they complained) (cited at Pet. 20), *cert. denied*, 125 S. Ct. [illegible] (2005).

c. Finally, Anderson [illegible]s, and fails to show a split of authority, in arguing that the Fourth Circuit's discussion of Dr. Bradley's study runs afoul of *Griggs* and cases interpreting it by "impos[ing] an additional prima facie burden on disparate impact plaintiffs to account for other possible legitimate factors that could explain prima facie

statistical disparities." Pet. 25-28. The Fourth Circuit faulted Dr. Bradley's statistical study not for failing to account for all "*other* possible legitimate factors that could explain" the disparity that he identified, Pet. 25 (emphasis added), but for failing to show that *any* specific employment practice caused the disparity. That holding is entirely consistent with the cases cited by Anderson.

In all but two of these cases, unlike here, the plaintiffs showed that a specific employment practice or selection criterion caused the identified disparate impact. *See Teal*, 457 U.S. at 443 n.4, 445 (test); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (height requirement); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (test); *Griggs*, 401 U.S. at 430 n.6 (high school graduation requirement); *Berger*, 843 F.3d at 1414 (educational prerequisite to union membership); *EEOC v. Steamship Clerks Union*, 48 F.3d 594, 605 & n.12 (1st Cir. 1995) (membership sponsorship requirement for union membership; court stressed that "there is nothing to indicate any omitted variable"); *Waisome v. Port Auth.*, 948 F.2d 1370, 1378 (2d Cir. 1991) ("aspect of the examination's procedures [that] had a disparate impact"); *Newark Branch, N.A.A.C.P. v. Harrison*, 940 F.2d 792, 801 (3d Cir. 1991) (residency requirement); *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 560 (5th Cir. 1988) (reclassification of employees pursuant to stipulation between employer and union); *Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir. 1989) (test); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506, 513 (8th Cir. 1980) (high school graduation requirement); *Bouman v. Block*, 940 F.2d 1211, 1224 (9th Cir. 1991) (tests); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1314 (9th Cir. 1999) (interview passage requirement).

In one of the remaining cases, *Phillips v. Cohen*, 400 F.3d 388 (6th Cir. 2005), the defendant conceded that the "entire promotion decision process should be considered as a whole to determine disparate impact," *id.* at 398, pursuant to the

statutory exception for "elements of a . . . decisionmaking process [that] are not capable of separation for analysis," 42 U.S.C. § 2000e-2(k)(1)(B)(i), a provision that does not apply here, *see infra* at 21-22. And in the final case cited by Anderson, *In re Employment Discrimination Litigation Against State of Alabama*, 198 F.3d 1305, 1324 (11th Cir. 1999), the court held that Congress had validly abrogated the states' Eleventh Amendment sovereign immunity in enacting the disparate-impact provisions of Title VII—an issue wholly inapposite here. Nothing in the cases cited by Anderson contravenes or conflicts with the decision below.

3. Anderson's remaining factbound criticisms of the Fourth Circuit's discussion of Dr. Bradley's statistical evidence are meritless and do not even purport to allege a conflict with other decisions or to raise an important federal question.

First, Anderson argues that Dr. Bradley's study did not need to control for any variables because the CBPS itself ensures that those candidates who reach the second and third stages of the process are at least minimally qualified according to objective criteria. Pet. 23-24. Anderson does not suggest that this factbound question presents a split of authority, an important question of federal law, or any other "compelling" basis for this Court's review. Supreme Court Rule 10. In any event, Anderson's argument does not show that all candidates considered at the second and third stages of the CBPS are *equally* qualified, nor, more importantly, does it address the principal infirmity in Dr. Bradley's study—his failure to identify which of the numerous subjective and objective factors that make up the stages of the CBPS account for the alleged disparity that he identified.

Second, although Anderson does not invoke (and has never invoked) the statutory exception for "elements of a . . . decisionmaking process [that] are not capable of separation for analysis," *see* 42 U.S.C. § 2000e-2(k)(1)(B)(i), she

nevertheless suggests that it is not possible to determine which of the factors that make up the CBPS caused the alleged statistical disparity that Dr. Bradley identified. Pet. 21 & n.11. Anderson does not suggest that this question is exceptionally important or that the Fourth Circuit's decision on this issue conflicts with decisions of this Court or others. In any event, as the court's opinion makes clear, *see* Pet. App. 7-9, 30-31, and as Respondents demonstrated in their brief on appeal, *see* Appellees' Br. in the Fourth Circuit at 2-3, and above, *see supra* at 1-3, 6, 12-14, the CBPS constrains managers' discretion through core competencies necessary for all jobs and through functional competencies unique to each job opening, with a weight assigned to each competency. In addition, Respondents maintain records of criteria-specific scores assigned to applicants for jobs posted through the CBPS. Accordingly, Dr. Bradley could have determined what disparate impact, if any, the use of *each* core and functional competency had on black applicants. Because he failed to do so and chose instead to test the cumulative effect of all selection criteria at each stage, his testimony was legally insufficient to establish the inference of causation required by *Watson*, *Wards Cove*, and the Civil Rights Act of 1991.

The Fourth Circuit's holding is consistent with the opinions of this Court and of other circuits. Anderson's factbound arguments to the contrary reflect a fundamental misunderstanding of the Fourth Circuit's opinion, of the opinions of other courts, and of the limited role of certiorari jurisdiction. At bottom, Anderson simply disagrees with the Fourth Circuit's application of settled law to the particular facts of her case. Her unfounded request for factbound error correction does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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